

United States
Circuit Court of Appeals
For the Ninth Circuit.

GERALD F. SCHLESINGER,

Petitioner,

vs.

DAVID BURNET, Commissioner of Internal
Revenue,

Respondent.

Transcript of Record.

Upon Petition to Review an Order of the United States
Board of Tax Appeals.

No. 6180—INDEX TO TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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[3] Filed Sept. 24, 1925.

United States Board of Tax Appeals.

DOCKET No. 7454.

Appeal of GERALD F. SCHLESINGER, Flood Building, San Francisco, California.

PETITION.

The above-named taxpayer hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter IT:PA:-4-60D-GWF-406 dated July 29, 1925 and as the basis of his appeal sets forth the following:

1. The taxpayer is an individual with his place of business in the Flood Building, San Francisco, California. He was formerly a member of the copartnership Schlesinger and Bender with its principal office at the same address.
2. The deficiency letter (a copy of which is attached) was mailed to the taxpayer July 29, 1925.
3. The taxes in controversy are income taxes for the calendar years 1918 and 1919 and are less than \$10,000.00 to wit \$1,021.92 excepting for any adjustment which will be rendered necessary upon the Treasury Department's acceptance of California taxpayers' returns filed on a community property basis.
4. The determination of tax contained in the said deficiency letter is based upon the following error:—

- (a) Failure of the Commissioner to allow as a deduction from income in the tax returns filed by Schlesinger and Bender a loss amounting to \$13,947.42 sustained in the calendar years 1918, 1919 and 1920 due to the enactment of prohibition legislation thus increasing the *pro rata* share of partnership income taxable to the taxpayer.
5. The facts upon which the taxpayer relies as the basis of his appeal are as follows:

- (a) In its tax return for the six months period ending December 31, 1918 the copartnership Schlesinger and Bender claimed as a deduction the sum of \$21,848.60 as exhaustion, wear and tear (including obsolescence) of tangible properties. This sum consisted of the following balances:

[4] Unamortized balance of buildings on leased ground account	\$ 7,200.00
Balance of cooperage, furniture and fixtures account	13,965.03
Additional depreciation not charged on books (details not now available)	683.57
<hr/>	
Total as above	\$21,848.60
<hr/>	

- (b) In its tax return for the calendar year 1920 the copartnership of Schlesinger and Bender reported as income the sum of \$7,801.18 being the total proceeds from sales of cooperage, scrap and office furniture.
- (c) The Commissioner in his letter dated Oc-

tober 22, 1924, file IT:PA:4-GWF-406 allowed as a deduction to Schlesinger and Bender obsolescence of goodwill amounting to \$52,814.70 apportionable between the years 1918, 1919 and 1920 as follows:—

1918	12/37	\$17,129.09
1919	24/37	34,258.19
1920	1/37	1,427.42

	As above	\$52,814.70

(d) The deduction mentioned in paragraph 5 (a) above as originally claimed by the co-partnership was in error and, as in paragraph 4 above, the correct deductible amount is \$13,947.42 made up as follows:

Unamortized balance of buildings on leased ground, reverted to lessor January 16, 1920.....	\$7,200.00
Cooperage, furniture, fixtures, etc., book value	\$13,965.03

Less:

Proceeds of sales originally re- ported as income in the year 1920	\$7,801.18
Estimated value of office furniture re- tained	100.00
	7,901.18
Additional depreciation n o t charged in books (the details of this item are now available but	6,063.8

the amount is reasonable because no other depreciation was claimed)	6
Total	<u>\$13,9</u>

[5] The above amount should, it is believed, be apportioned in the same manner as that used by the Commissioner in apportioning the deduction for obsolescence of goodwill as in 5 (c) above as follows:—

1918	12/37	\$ 4,523.49
1919	24/37	9,046.98
1920	1/37	376.95

Total as above	\$13,947.42
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6. The taxpayer, in support of his appeal, relies upon the following propositions of law:

- (a) That in computing net income there shall be allowed as deductions:
 - (4) Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in trade or business. Section 214 (a) Revenue Act of 1918
- (b) That in computing net income there shall be allowed as deductions:
 - (8) A reasonable allowance for the exhaustion wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. Section 214 (a) Revenue Act of 1918.

WHEREFORE the taxpayer respectfully prays that this Board may hear and determine his appeal.

W. M. SMITH,
Counsel for Taxpayer,
Address: 505 Transportation Bldg.,
Washington, D. C.

[6] TREASURY DEPARTMENT,
WASHINGTON.

July 29, 1925.

Office of

Commissioner of Internal Revenue

IT-PA:4-60D.

GWF-406.

Mr. Gerald F. Schlesinger,

Flood Building,

San Francisco, Calif.

Sir:

The determination of your income tax liability for the years 1918 and 1919 as set forth in office letter dated October 22, 1924, disclosed a deficiency in tax amounting to \$4,657.96.

In accordance with the provisions of Section 274 of the Revenue Act of 1924, you are allowed 60 days from the date of mailing of this letter within which to file an appeal to the United States Board of Tax Appeals contesting in whole or in part the correctness of this determination.

Where a taxpayer has been given an opportunity to appeal to the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made or where

a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the inclosed agreement consenting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:PA:4-60D-GWF:406. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,
D. H. BLAIR,
Commissioner.
By (Signed) C. B. ALLEN,
Acting Deputy Commissioner.

Inclosures:

Statements.
Agreement—Form A.

[7] STATEMENT.

IT:PA:4-60D.

GWF-406.

In re: Mr. Gerald F. Schlesinger,
171 Palm Avenue,
San Francisco, Calif.

Years.	Deficiency in tax.
1918 (waiver filed)	\$ 409.02
1919 " "	4,248.94
Total	\$4,657.96

An audit of the 1918 partnership income return of Schlesinger and Bender discloses your distributive interest to be \$20,912.93 instead of \$19,339.76, as reported. The adjustments made in the partnership income are fully explained in a separate communication to Schlesinger and Bender.

An adjustment of this item increases your net income by \$1,573.17, which is subject to normal tax at 12% and surtax at 14% or a total tax of \$409.02.

It is noted that you reported a loss of \$9,717.88 from the partnership of Schlesinger and Bender on your 1919 return, whereas an audit of the 1919 partnership return discloses your corrected distributive interest to be \$16,523.65.

The adjustment of this item increases your net income by \$26,241.53.

The tax liability on your corrected net income

of \$32,702.10 is \$4,399.65 and as \$150.71 was assessed, there is a deficiency in tax amounting to \$4,248.94 for the year 1919.

Consideration has been given to your protest by the Solicitor of Internal Revenue, and the Unit is sustained in determining the above deficiency.

Consideration was also given to the facts contained in your letter of July 8, 1925.

[8] State of California,
City and County of San Francisco.

Gerald F. Schlesinger, being duly sworn says that he is the taxpayer mentioned in the foregoing petition; that he has read the said petition, or had the same read to him, and is familiar with the statements therein contained, and that the facts therein stated are true, except such facts as are stated to be upon information and belief, and those facts he believes to be true.

GERALD F. SCHLESINGER.
By LeRoy F. SCHLESINGER,
Atty.-in-fact.

Sworn before me this 15th day of September, 1925.

L. P. LOVELAND,
Notary Public in and for City and County San
Francisco, State of California.

Now, March 1, 1930, the foregoing Petition certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[9] Filed Oct. 19, 1925. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 7454.

Appeal of GERALD F. SCHLESINGER, San Francisco, California.

ANSWER.

The Commissioner of Internal Revenue, by his attorney, A. W. Gregg, Solicitor of Internal Revenue, for answer to the petition of the above-named taxpayer, admits, denies and alleges as follows:

(1) Admits the allegations contained in paragraphs 1, 2 and 3 of the petition.

(2) Denies that any error was made in the determination of the deficiency in tax set out in the letter of July 29, 1925.

(3) Admits that in its tax return for the period ending December 31, 1918, the copartnership claimed as a deduction the sum of \$21,848.60 as exhaustion, wear and tear of tangible properties.

(4) Admits the allegations contained in subparagraphs (b) and (c) of paragraph 5.

(5) Admits that the deduction of \$21,848.60 claimed by the taxpayer in its return for the period ending December 31, 1918, was erroneous; denies that the correct amount is \$13,947.42 and further denies that the taxpayer is entitled to any deduction on account of obsolescence of its tangible property.

(6) Denies, generally and specifically, each and every allegation in the taxpayer's petition contained not hereinbefore admitted, qualified or denied.

[10] PROPOSITION OF LAW.

The taxpayer is not entitled to any deduction on account of the obsolescence of its tangible properties.

WHEREFORE, it is prayed that the taxpayer's appeal be denied.

A. W. GREGG,

Solicitor of Internal Revenue,
Attorney for Commissioner of Internal Revenue.

Of Counsel:

M. N. FISHER,

Special Attorney,

Bureau of Internal Revenue.

Now, March 1, 1930, the foregoing answer certified from the record as a true copy.

[Seal]

B. D. GAMBLE,

Clerk, U. S. Board of Tax Appeals.

[11] Recd. Apr. 7, 1927. United States Board of
Tax Appeals.

Filed Apr. 8, 1927.

United States Board of Tax Appeals.

DOCKET No. 7454.

GERALD F. SCHLESINGER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

AMENDED ANSWER.

The Commissioner of Internal Revenue by his attorney, A. W. Gregg, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer admits, denies and alleges as follows:

1. Admits the allegations contained in paragraph 1 of the petition.
2. Admits the allegations contained in paragraph 2 of the petition.
3. Denies the allegations contained in paragraph 3 of the petition, and alleges that the taxes in controversy are income taxes for the calendar years 1918 and 1919 and are less than \$10,000.00, to wit, \$5,532.03.
4. (a) Denies that the Commissioner erred in the determination of the taxes as alleged in subdivision (a) of paragraph 4 of the petition, and alleges that the Commissioner erred in not including in the petitioner's income for the year 1918, \$5,709.70 and for the year 1919, \$11,419.39, said amounts being the petitioner's distributive interest in \$52,814.70 deducted for the taxable years 1918 and 1919 by Schlesinger and Bender as obsolescence of goodwill.
(b) Admits that in its tax return for the period ending December 31, 1918, the copartnership claimed as a deduction the sum of \$21,848.60, as exhaustion, wear and tear of tangible properties.
5. (b) Admits the allegations contained in subdivision (b) of paragraph 5 of the petition.

[12] 5. (c) Admits the allegations contained in subdivision (c) of paragraph 5 of the petition, and alleges that the obsolescence of goodwill amounting to \$52,814.70 deducted by Schlesinger and Bender as alleged in subdivision (c) of paragraph 5 of the petition is not an allowable deduction to said copartnership.

5. (d) Admits that the deduction of \$21,848.60 claimed by the copartnership in its return for the period ending December 31, 1918, was erroneous. Denies that the correct amount deductible is \$13,947.42 and further denies that the copartnership is entitled to any deduction for obsolescence of its tangible property.

Denies generally and specifically each and every other allegation contained in the petition of the above-named taxpayer not hereinbefore expressly admitted, qualified or denied.

WHEREFORE, it is prayed that the appeal be denied.

A. W. GREGG,
General Counsel,
Attorney for the Commissioner of Internal Revenue.

Of Counsel:

THOMAS M. MATHER,
Special Attorney,
Bureau of Internal Revenue.

Now, March 1, 1930, the foregoing amended answer certified from the record as a true copy.

[Seal]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[13] United States Board of Tax Appeals.

DOCKET No. 7454.

GERALD F. SCHLESINGER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

AMENDMENT TO PETITION.

Leave from the United States Board of Tax Appeal, first being had and obtained, the petitioner in the above entitled and numbered cause, hereby files the following amendment to the petition now on file herein, and by way of such amendment adds to and includes in said petition the following allegation:

Petitioner further alleges by way of appeal, that all of the alleged deficiencies and taxes claimed or set forth in the said deficiency letter upon which this appeal is predicated and all alleged deficiencies and taxes claimed or set forth in the answer and amendment Answer of the Commissioner of Internal Revenue herein, are forever barred by and under, the provisions of, and periods of limitations contained in, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1919, the Revenue Act of 1920, the Revenue Act of 1921, the Revenue Act of 1924, and the Revenue Act of 1926, and particularly Section 277 of said last named Act.

WHEREFORE, the petitioner respectfully prays that this Board may hear and determine his appeal.

JEROME H. BAYER,
Counsel for Petitioner.

State of California,
City and County of San Francisco.

Gerald F. Schlesinger, being duly sworn, deposes and says that he is the petitioner above named; that he has read the foregoing amendment, or had the same read to him, and is familiar with the statements contained therein and that the facts stated therein are true except such facts as are stated to be upon information and belief and those facts he believes to be true.

GERALD F. SCHLESINGER.

Sworn to before me this 3d day of May, 1927.

[Seal] J. J. KERRIGAN,
Notary Public in and for the City and County of
San Francisco.

Now, March 1, 1930, the foregoing amendment to petition certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[14] DOCKET Nos. 7453 and 7454.

LEON L. MOISE, GERALD F. SCHLESINGER,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ORDER.

It appearing from the record that on May 4, 1927, on motion of petitioner, without objection by respondent, leave was granted petitioner to file amended petitions or amendments to petitions in each of the proceedings, Docket Nos. 7453, 7454, 7455 and 8036. Thereafter petitioner submitted amended petitions in Docket Nos. 7455 and 8036 which were duly filed as of May 4, 1927, and has now submitted amended petitions in Docket Nos. 7453 and 7454. It appearing that the amended petitions in the foregoing mentioned proceedings are such amendments as were authorized May 4, 1927, it is

ORDERED that petitioner's amended petitions submitted in Docket Nos. 7453 and 7454 be received and filed *nunc pro tunc* as of May 4, 1927.

(Signed) BENJAMIN H. LITTLETON,

Member, U. S. Board of Tax Appeals.

Dated Washington, D. C., June 17, 1929.

A true copy.

[Seal] Teste: B. D. GAMBLE,

Clerk, U. S. Board of Tax Appeals.

Now, March 1, 1930, the foregoing order certified from the record as a true copy.

[Seal] B. D. GAMBLE,

Clerk, U. S. Board of Tax Appeals.

[28] United States Board of Tax Appeals.

DOCKET No. 7454.

GERALD F. SCHLESINGER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ORDER OF REDETERMINATION.

Pursuant to the Board's findings of fact and opinion promulgated September 25, 1928, it is

ORDERED AND DECIDED that there are deficiencies in tax in respect of the above-entitled petitioner of \$1,848.86 for the year 1918 and \$7,182.68 for the year 1919.

(Signed) B. H. LITTLETON,

Member, U. S. Board of Tax Appeals.

Dated Washington, D. C.

Entered Dec. 15, 1928.

A true copy.

Teste: B. D. GAMBLE,

Clerk, U. S. Board of Tax Appeals.

Now, March 1, 1930, the foregoing order of redetermination certified from the record as a true copy.

[Seal]

B. D. GAMBLE,

Clerk, U. S. Board of Tax Appeals.

[29] Filed June 11, 1929.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

GERALD F. SCHLESINGER,
Petitioner and Appellant,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent and Appellee.

PETITION FOR REVIEW OF DECISION OF
THE UNITED STATES BOARD OF TAX
APPEALS.

To the Honorable, the Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:

Now comes Gerald F. Schlesinger, the above des-
ignated petitioner and appellant (hereinafter called
petitioner), and files this petition for the review of
the findings of fact and opinion of the United States
Board of Tax Appeals in the appeal before said
Board designated therein as Docket #7454, promul-
gated on the 25th day of September, 1928, and the
decision and order of redetermination of said Board
rendered and entered in said appeal on the 15th day
of December, 1928, approving, redetermining and
fixing deficiencies in income tax of the petitioner for
the calendar years 1918 and 1919 in the amounts of
\$1,848.86 and \$7,182.68, respectively, and your peti-
tioner respectfully shows:

[30] I.

STATEMENT OF THE NATURE OF THE CONTROVERSY.

The respondent and appellee (hereinafter called respondent) is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States of America.

The said petitioner made his return of income tax with respect to his income for the year 1918, to the Collector of Internal Revenue at Chicago, Illinois, not later than March 22, 1919, and made his return of income tax with respect to his income for the year 1919 to the Collector of Internal Revenue in the First District of California, not later than March 15, 1920.

Respondent notified petitioner by means of a sixty-day letter, dated July 29, 1925, that a deficiency was disclosed in his tax returns for the years 1918 and 1919, totaling \$4,657.96. This deficiency arose, primarily, out of the disallowance of a deduction for obsolescence of the tangible assets of the partnership of Schlesinger & Bender, of which petitioner was a member. This firm was engaged in the wholesale liquor business, with its principal place of business at San Francisco, California. The premises which it occupied were leased premises. The partnership was obliged to, and did, terminate its business in January, 1920, by reason of prohibition legislation, which resulted in the obsolescence both of the tangible assets and goodwill of

the partnership. A deduction for obsolescence of goodwill was [31] allowed to said partnership by the Commissioner of Internal Revenue. A deduction for obsolescence of tangible assets was made upon the income tax return filed by the partnership for the year 1918. This deduction was disallowed by the Commissioner of Internal Revenue, as set forth in said sixty-day letter dated July 29, 1925. From said letter petitioner took an appeal within the time and in the manner provided by law, to the United States Board of Tax Appeals. This appeal was designated in the files of said Board as Docket No. 7454. Said appeal was decided by said Board adversely to said petitioner. It is the proceedings, findings of fact, opinion, decision and order of redetermination of said Board in that appeal which petitioner now seeks to have reviewed and reversed by this Honorable Court.

The questions considered, or ruled upon, by said United States Board of Tax Appeals in said appeal, as well as the questions arising out of the actions, rulings, findings of fact, opinion, decision, and order of redetermination of said Board therein, are, substantially, as follows:

Whether or not a form of written consent or waiver executed by a taxpayer, is effective to extend the statutory period of limitation for the assessment and/or collection of taxes, without, or before, the approval thereof by the Commissioner of Internal Revenue.

Whether or not a form of written consent or waiver executed and/or filed by a taxpayer

after the expiration of the statutory period of limitation for the assessment and/or collection of taxes, is valid and effective.

[32] Whether or not a written consent or waiver filed with the Commissioner within the statutory period of limitations, but not approved by the Commissioner until after the expiration of said statutory period, is effective.

Whether or not the Commissioner of Internal Revenue had the right to file an amended answer in said appeal, without prior notice to said petitioner, and without prior opportunity of said petitioner to be heard with respect thereto.

Whether or not the Commissioner had the right to insert in his amended answer in said appeal, new matter and matter not mentioned or referred to or incorporated in his sixty-day letter to petitioner, from which letter said appeal was taken.

Whether or not said United States Board of Tax Appeals had jurisdiction to determine alleged deficiencies additional to or greater or other than the alleged deficiency set forth in the sixty-day letter of the Commissioner to petitioner, and in no wise made a part of petitioner's said appeal, and being wholly different in nature and in the facts out of which they arise from that set forth in said sixty-day letter.

Whether or not entries in books of account of said partnership, and the oral testimony of competent witnesses, introduced at the hearing

of said appeal by the petitioner, were sufficient, as a matter of law, to establish the value and rates of depreciation of tangible properties of said partnership, for the obsolescence of which a deduction was claimed, in the absence of any offer of evidence or proof to the contrary by the Commissioner.

Whether or not the Commissioner validly and effectively asserted at or before the hearing of said appeal a claim for deficiency other or greater than, or in addition to, the alleged deficiency set forth in said sixty-day letter.

Whether or not obsolescence of goodwill, occasioned by prohibition legislation, constituted an allowable deduction.

[33] Whether or not obsolescence of tangible assets occasioned by prohibition legislation constituted an allowable deduction, and if so, whether or not said partnership was entitled to apportion the loss resulting from said obsolescence over a period beginning with the time when it first learned that it would be obliged to discontinue its business, and ending with the time when said business was actually terminated by reason of said prohibition legislation.

Whether or not petitioner was entitled to a continuance of said hearing of said appeal.

The foregoing questions were decided by said United States Board of Tax Appeals adversely to petitioner, and the position of petitioner with re-

spect thereto is covered by the assignments of error hereinafter set forth.

II.

DESIGNATION OF COURT OF REVIEW.

Petitioner is a resident of the State of California, and being aggrieved by the said decision, findings of fact, opinion, and order of redetermination of said Board, desires that same be reviewed in accordance with law by the United States Circuit Court of Appeal for the Ninth Circuit.

ASSIGNMENTS OF ERROR.

Petitioner, as a basis for review, assigns the following errors which he avers occurred before and upon the hearing of said cause, by the United States Board of Tax Appeals and in the decision, findings of fact, and opinion, of said Board therein, [34] and in the order of redetermination rendered, given and made in said cause, and upon which errors he relies to reverse said decision and order of redetermination, to wit:

- (1) The said Board erred in rendering its decision for respondent herein.
- (2) The said Board erred in determining that there were deficiencies in the taxes of petitioner for the years 1918 and 1919 in the amounts of \$1,848.86 and \$7,182.68, respectively, or in any amount or amounts at all, or any deficiency at all.
- (3) The said Board erred in allowing respondent's amended answer herein to be filed without previous notice being given to the petitioner herein,

and in granting respondent's motion for the filing of said amended answer without previous notice to petitioner of said motion, or a hearing thereof.

(4) The said Board erred in refusing to strike the amended answer of respondent herein upon motion duly made by petitioner at the hearing of said cause, and in denying said motion.

(5) The said Board erred in refusing to grant to petitioner and in denying his motion for a continuance of the hearing of said appeal.

(6) The said Board erred in refusing, upon motion duly made therefor by petitioner at the hearing of said cause, to strike from respondent's amended answer an allegation in paragraph 4a thereof, which reads as follows:

"alleges that the Commissioner erred in not including in Petitioner's income for the year 1918, [35] \$5709.70, and for the year 1919, \$11,-419.39; said amounts being Petitioner's distributive interest in \$52,814.70, deducted for the taxable years 1918 and 1919, by Schlesinger & Bender, as obsolescence of goodwill."

The Board erred in denying said motion.

(7) The said Board erred in refusing, upon motion duly made therefor by petitioner at the hearing of said cause, to strike from respondent's amended answer an allegation of paragraph 5c, which reads as follows:

"and alleges the obsolescence of goodwill amounting to \$52,814.70 deducted by Schlesinger & Bender as alleged in subdivision c of

paragraph 5 of the petition is not an allowable deduction to said copartnership."

The Board erred in denying said motion.

(8) The said Board erred in holding that the so-called affirmative allegations contained in respondent's amended answer, were properly included and might remain therein.

(9) The said Board erred in considering obsolescence of goodwill as an issue in said appeal, and in ruling that it was an issue therein, and in holding that obsolescence of goodwill was made an issue of and in said appeal by the pleadings therein.

(10) The said Board erred in its failure to find or hold that petitioner was entitled to claim deduction for loss occasioned by obsolescence of the furniture, equipment and leasehold improvements of the partnership of Schlesinger & Bender, of which he was a member, and to apportion this loss over the period of eighteen and one-half months, beginning with 1918, when the partnership first learned that it would be obliged to terminate [36] the business, and ending in 1920, when the business was terminated by reason of prohibition legislation.

(11) The said Board erred in its failure to find that improvements on the leasehold of the partnership of Schlesinger & Bender had a value of \$7,200.00, and that said value was entirely wiped out by complete obsolescence of said improvements, upon the termination of the lease.

(12) The said Board erred in its failure to find that the value of tangible assets (exclusive of lease-

hold improvements) of the partnership of Schlesinger & Bender, for which obsolescence was claimed, was \$13,965.03, and that as a result of said obsolescence the value was reduced to a junk value of \$7,-801.18.

(13) The said Board erred in finding that no entries were made on the books of the partnership of Schlesinger & Bender of the sale in 1920 of its furniture and equipment. Said finding is wholly unsupported by and contrary to the evidence.

(14) The said Board erred in its failure to find that the proceeds received by the partnership of Schlesinger & Bender in 1920 from the sales of cooperage, scrap, and office furniture, was the sum of \$7,801.18; said cooperage, scrap, and office furniture being part of the property for which a deduction for obsolescence was claimed.

(15) The said Board erred in its failure to find that the partnership of Schlesinger & Bender discontinued on or about January 16, 1920, the use of its leasehold premises.

(16) The said Board erred in its failure to find that deduction for obsolescence of goodwill in the amount of \$52,814.70 [37] was, in fact, allowed to copartnership of Schlesinger & Bender by the Commissioner of Internal Revenue.

(17) The said Board erred in finding that a motion was duly granted by the Board for the filing of an amended answer in this proceeding. Said finding is wholly unsupported by and contrary to the evidence.

(18) The said Board erred in finding that at the hearing of this cause, Commissioner contended for an increase of deficiencies, based upon the alleged affirmative allegations in the amended answer with respect to the deduction for obsolescence of goodwill. Said finding is wholly unsupported by and contrary to the evidence.

(19) The said Board erred in holding that any waiver executed by petitioner for 1918, was valid and/or effectively extended the time fixed by law within which assessment could be made for that year.

(20) The said Board erred in holding that any waiver executed by petitioner for 1919, was valid and/or effectively extended the time fixed by law within which assessment could be made for that year.

(21) The said Board erred in failing to hold that a waiver bearing the purported signature of petitioner, dated February 25, 1924, covering 1918, but bearing no stamp of approval earlier than September 25, 1924, was not effective to bar the assessment and/or collection of taxes, the statutory period in which assessment [38] and/or collection could be made, having expired March 22, 1924.

(22) The said Board erred in failing to hold that a waiver bearing the purported signature of petitioner for 1918, dated February 3, 1925, expiring December 31, 1925, and bearing no stamp of approval earlier than March 25, 1925, was invalid and void and did not extend the period fixed by law, said statutory period having expired March 22, 1924.

(23) The said Board erred in failing to hold that a waiver bearing the purported signature of petitioner for the year 1919, dated January 30, 1925, and expiring December 31, 1925, and bearing no stamp of approval earlier than March 25, 1925, was invalid and void and did not extend the period fixed by law, said statutory period having expired March 15, 1925.

(24) The said Board erred in holding that a consent or waiver executed after statutory period of limitations has expired, is valid, and that taxes may be assessed within the period of such consent or waiver.

(25) The said Board erred in holding that a consent or waiver is valid and that taxes may be assessed within the period of such consent or waiver, notwithstanding the fact that such waiver or consent has not been approved by the Commissioner until after the expiration of the statutory period of limitations.

(26) The said Board erred in denying the contention of petitioner with respect to the issue of the statute of limitations.

(27) The said Board erred in holding that the evidence was [39] insufficient as to the value of the tangible assets on account of which obsolescence was claimed.

(28) The said Board erred in holding that there was not sufficient evidence to establish how the book values of the tangible assets for which deduction for obsolescence was claimed, were computed, and in holding that the method of computing said book values was necessary to be proved.

(29) The said Board erred in holding that there was no proof of costs or appropriate rates of depreciation of the tangible assets for which deduction for obsolescence was claimed.

(30) The said Board erred in its failure to hold that the amount sold or salvaged from the furniture and equipment of Schlesinger & Bender in 1920, was \$7,801.18.

(31) The said Board erred in finding and holding that it had no basis upon which to determine the amount of obsolescence either of furniture and equipment and/or leasehold improvements, and in denying petitioner's contention upon that issue. Said finding is wholly unsupported by and contrary to the evidence.

(32) The said Board erred in holding that petitioner was not entitled to deduct and could not deduct anything for obsolescence of tangible assets of said partnership of Schlesinger & Bender.

(33) The said Board erred in holding that the Commissioner had erred in allowing the partnership of Schlesinger & Bender a deduction for obsolescence of goodwill.

[40] (34) The said Board erred in holding that the Commissioner did at or before the hearing of said cause, effectively or at all assert a claim for an increased deficiency or for a deficiency in excess of the amount originally determined by him.

(35) The said Board erred in holding that by so-called affirmative allegations in his amended answer, or otherwise, or at all, Commissioner had effectively asserted a claim for an increased de-

ficiency within the meaning of Section 274 E. of the Internal Revenue Act of 1926, or otherwise, or at all.

(36) The said Board erred in finding and holding that the following statements in the amended answer constituted affirmative allegations, to wit: "that the Commissioner erred in not including in the petitioner's income for the year 1918, \$5,709.70, and for the year 1919, \$11,419.39, said amounts being the petitioner's distributive interest in \$52,814.70 deducted for the taxable years 1918 and 1919, for obsolescence of goodwill," and "that the obsolescence of goodwill amounting to \$52,814.70 * * * is not an allowable deduction to said copartnership."

(37) The said Board erred in failing to hold that the prayer in said amended answer completely negatived the construction of said amended answer as an assertion of a claim for affirmative relief.

(38) The said Board erred in holding that obsolescence of goodwill is not an allowable deduction from gross income.

(39) The said Board erred in holding that a sufficient claim for additional deficiency or addition in tax is made if the Commissioner [41] affirmatively alleges error in his original determination, together with facts sufficient, if proved, to result in an increase of the net income and the tax of the petitioner over that originally determined by him.

(40) The said Board erred in assuming jurisdiction over and in considering and determining

as issues, matters and items not mentioned in or made subject matter of the Commissioner's letter to petitioner and not otherwise effectively asserted at or before the hearing.

(41) The said Board erred as follows: Said Board failed and refused to allow any deduction for obsolescence of furniture and equipment of the copartnership of Schlesinger & Bender, and to allow a re-apportionment of this deduction over the years 1918, 1919 and 1920; and, notwithstanding this fact, said Board failed to allow any credit to petitioner for his distributive share of the tax paid for 1920 upon \$7,801.18, reported as a profit by the copartnership of Schlesinger & Bender in the year 1920, and representing the amount received as salvage by said copartnership of said furniture and equipment.

(42) The said Board erred in overruling the objection of counsel for petitioner to the question put to LeRoy Schlesinger, and set forth on pages 58 and 59 of the transcript of the proceeding upon said appeal, and reading as follows:

“Q. And did they ever claim a deduction for the obsolescence of goodwill for prohibition purposes in those returns?

Mr. BAYER.—I should like, at this time, to interpose an [42] objection to all questions, relating to obsolescence of goodwill, and to save time, I ask that that same objection be preserved with respect to all questions with reference thereto.

Mr. VAN FOSSAN, Member.—The objection is overruled.”

(43) The said Board erred in making an order of redetermination and/or decision pursuant to the Board's findings of fact and opinion promulgated September 25, 1928.

(44) The said Board erred in ordering and deciding that there is any deficiency or tax or sum of money due, collectible, and/or assessable from or against the above-named petitioner, for the years 1918 and 1919.

(45) The said Board erred in that its decision rendered in said appeal is contrary to and against law.

(46) The said Board erred in ordering the entry of judgment under Rule 50 pursuant to the prevailing opinion of the Board rendered in said appeal.

WHEREFORE, the above-mentioned petitioner herein prays that the United States Circuit Court of Appeals for the Ninth Circuit, review the action of the said United States Board of Tax Appeals in this cause, and reverse said decision and order of redetermination of said Board, and direct and order the making an entry of a decision and order by said Board in favor of the petitioner, determining that there is no deficiency or increased deficiency in income taxes due, collectible and/or assessable from the petitioner for the years 1918 and 1919, and that there is no tax or amount at [43] all due, collectible and/or assessable from or against said petitioner for the years 1918 and 1919, and that the Clerk of said Board be directed to transmit and deliver to the Clerk of the United States Circuit

Court of Appeals for the Ninth Circuit, certified copies of each and all of the documents necessary and material to the presentation and consideration of the foregoing petition for review, and as required by the rules of said court and by law, and for such other and further relief as may to this court appear proper in the premises.

And your petitioner will ever pray.

GERALD F. SCHLESINGER,

Petitioner and Appellant.

JEROME H. BAYER,

Attorneys for Petitioner and Appellant,

1225 Crocker First National Bank Building,
San Francisco, California.

[44] State of California,

City and County of San Francisco,—ss.

Gerald F. Schlesinger, being first duly sworn, on oath deposes and says:

That he is the petitioner and appellant above named; that he has read the foregoing petition; that the same is true of his own knowledge except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true; and that the said petition is filed in good faith.

GERALD F. SCHLESINGER.

Subscribed and sworn to before me this 29th day of May, 1929.

[Seal] LAURA E. HUGHES,
Notary Public in and for the City and County of
San Francisco, State of California.

[45] Filed Jun. 13, 1929. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 7454.

GERALD F. SCHLESINGER,

Petitioner and Appellant,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent and Appellee.

NOTICE.

To Hon. C. M. Charest, General Counsel, Bureau of Internal Revenue, Washington, D. C.

You are hereby notified that the above-named petitioner this 8th day of June, 1929, filed with the Clerk of the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision, findings of fact, opinion, and order of redetermination of said Board in the above-entitled matter. A copy of said petition for review and assignments of error as filed is attached hereto.

JEROME H. BAYER,

Attorneys for Petitioner and Appellant,
1225 Crocker First National Bank Bldg.,
San Francisco, California.

I hereby this 8 day of June, 1929, accept personal service of a copy of the petition to review and assignments of error in the above-entitled matter together with notice of the filing thereof.

(S.) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue, for
Respondent and Appellee.

Now, March 1, 1930, the foregoing petition for review with proof of service certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[46] Filed Feb. 12, 1930. United States Board
of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 7454.

GERALD F. SCHLESINGER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STIPULATION.

It is hereby stipulated and agreed by and between the parties in the above-entitled cause through their respective attorneys that the statement of evidence as approved by a member of the Board of Tax Appeals in the case of Leon L. Moise, Docket No.

7453, is hereby incorporated by reference and the same shall constitute the statement of evidence in the above-entitled cause.

J. S. Y. IVINS,

Associate Counsel for Petitioner.

C. M. CHAREST.

C. M. CHAREST,

General Counsel, Bureau of Internal Revenue.

Now, March 1, 1930, the foregoing stipulation certified from the record as a true copy.

[Seal]

B. D. GAMBLE,

Clerk, U. S. Board of Tax Appeals.

[Endorsed]: No. 6180. United States Circuit Court of Appeals for the Ninth Circuit. Gerald F. Schlesinger, Petitioner, vs. David Burnet, Commissioner of Internal Revenue, Respondent. Transcript of Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed July 1, 1930.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

